SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 472

E. A. HILL,

Petitioner,

v.

ATLANTIC COAST LINE RAILROAD COMPANY,
a Corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA AND BRIEF IN SUPPORT THEREOF.

ISAAC D. TAYLOR,
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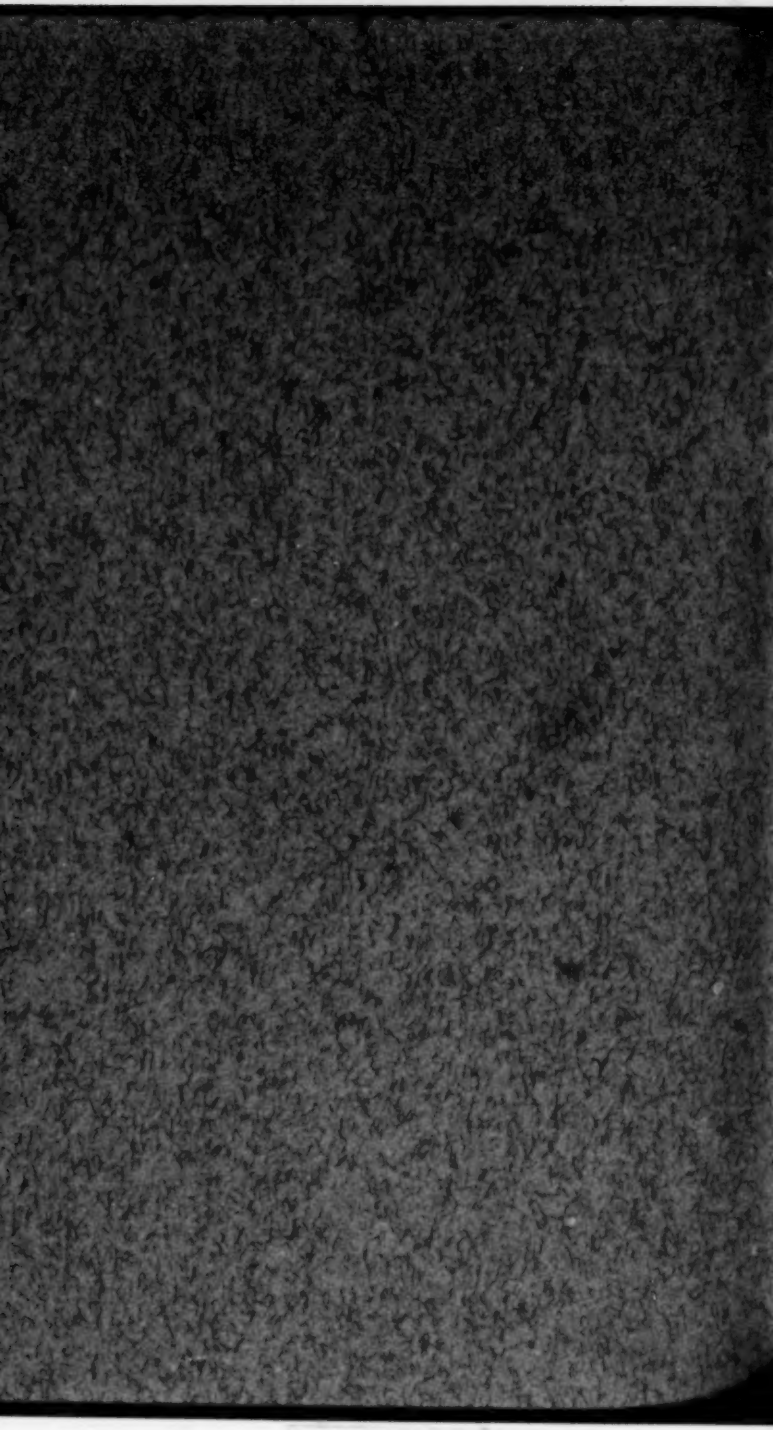

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

E. A. Hill respectfully petitions that a writ of certiorari issue to review the judgment the Supreme Court of North Carolina entered in this case on the twenty-second day of September, 1948.

A

Jurisdiction

The judgment of the Supreme Court of North Carolina was entered on the twenty-second day of September, 1948

(R. 37). The jurisdiction of this court is invoked under Chapter 646 Public Law 773, Eightieth Congress, 28 U. S. Code, Section 1257 (3), providing that final judgments entered by the highest court of a state in which a decision could be had may be reviewed by the Supreme Court by writ of certiorari, where any right is especially set up or claimed under the Statutes of the United States, and under 28 U. S. Code, Section 2101 (c), providing that the writ shall be applied for within ninety days after the entry of such judgment. This petition is filed on the 11th day of December, 1948.

The judgment complained of was rendered in an action brought by an employee of a railroad company against his employer for damages for personal injuries sustained by him by reason of the negligence of the railroad company, while the employee and the railroad company were engaged in interstate commerce (Complaint, R., page 1). That the defendant was engaged in interstate commerce and plaintiff was so employed is admitted by the answer (R. page 8) and found as a fact by the Supreme Court of North Carolina (229 N. C. at page 237, R. page 34). The case was determined by the interpretation and application of Federal Employers' Liability Act, 45 U. S. Code, Section 51 (opinion of Supreme Court of North Carolina at page 238, R., page 35). The case was tried and heard on appeal as one brought under the Federal act, and the plaintiff excepted to the judgment of nonsuit in the trial court and appealed therefrom to the Supreme Court of North Carolina, which affirmed the judgment. The judgment complained of adjudicates against the plaintiff, petitioner, a right claimed by him under a statute of the United States, and the Supreme Court of the United States has jurisdiction of the case.

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B

Statement of Matter Involved

The petitioner, E. A. Hill, was on duty as a trainman for respondent railroad company on December 5, 1945, with a work train engaged in unloading crossties from gondola cars and was seriously and permanently injured while on duty about 5 o'clock p. m. on that date, when he was struck by a crosstie on the right leg, lacerating the flesh, breaking the bone above the ankle, and inflicting a serious and permanent injury, at a place just north of Lucama in Wilson County, North Carolina. Action was instituted by him under the Federal Employers' Liability Act, 45 U. S. Code, Section 51, in the Superior Court of Nash County, North Carolina; at the conclusion of plaintiff's evidence, the Superior Court entered a judgment of nonsuit (R., page 10). On appeal, the Supreme Court of North Carolina affirmed, the decision and opinion of the court being published in the Advance Sheets, 229 N. C. Reports, at page 236 (R., page 34). The facts are as follows:

The petitioner, E. A. Hill, was on December 5, 1945, a married man, thirty-five years of age, employed by the Atlantic Coast Line Railroad Company as trainman. He had been working continuously for the defendant for three and one-half years. On December 5, 1945, he was assigned as a trainman on a train designated as Work Extra 1543. Alfred Sanders was the conductor (R., page 12). The train consisted of a locomotive and a caboose and eleven gondola cars in between (R., page 12). The gondola cars were loaded with crossties, which were creosoted and slippery (R., page 28). They were six or six and one-half feet long (R., page 20), either of pine or oak, squared logs, and weighed about 250 pounds each (R., page 19). L. T. Starling was the foreman or supervisor of a crew of nine men

(R., page 24) who were throwing the crossties over the west sides of the gondola cars as the train moved southerly at a very slow rate of speed, on the southbound track of the double-track railroad, between the town of Wilson and Lucama station. Three men worked together throwing over a tie (R., page 27). "Lift it up and let it go over the side" (R., page 27). By 5 o'clock in the afternoon of December 5, 1945, all cars had been unloaded except one, which was next to the caboose on the rear end of the train (R., page 24). The weather was hazy, cold and misty (R., page 25), and "it wouldn't have been long before it would have been dark" (R., page 21).

Both the petitioner, a trainman, and Mr. Sanders, the conductor, were in the cab of the locomotive, and the conductor ordered the petitioner to go to the caboose and get a "marker" (R., page 20) to place on the front of the engine. A marker is a rear light signalling yellow, green, or red (R., page 13), and is used on the front of the engine when the train is backing up. It was the conductor's intention to use the crossover track from the southbound to the northbound main line track just south of Lucama station, and proceed in reverse on the northbound track from that point twenty-six miles to Rocky Mound (R., page 21; R., page 23).

The petitioner in the performance of his duties of trainman had walked back and forth between the engine and caboose "a dozen or two times that same day" (R., page 14), using the same precaution (R., page 14). The conductor had made the same journey, from caboose to engine and back "several times that day" (R., page 21. On this occasion immediately after ordering the petitioner to go back to the caboose for the marker, the conductor himself got off the engine and proceeded ahead of petitioner to the rear of the train, on the west side of the track (R., page 21).

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The conductor did not instruct the petitioner which side of the train to use, but he testified (R., page 21), that the crossties of the southbound and northbound tracks are about three feet apart, that fast trains frequently pass and that "it was not safe for a man to walk between two trains on the east side" (R., page 21), and besides, if plaintiff had walked on the east side of the northbound track, a long freight train would have isolated him from the train to which he was assigned.

The conductor walked along side of train until he came close to the last gondola car, from which the crossties were being dropped over the west side, and then he circled to the west crossing a spur track and a small ditch alongside the spur track, and stepped over the ditch into the highway, some twenty-five feet from the southbound track of the railroad. (R. page 22.) He then proceeded to the caboose and was climbing up into it (R. page 19) when the petitioner, who had followed him to the rear of the train, "same direction he took" (R. page 19), was struck down by a crosstie, which had been thrown eighteen feet (R. page 14) from the southbound track, three times its length, at the drain ditch. "The place where plaintiff was walking was farther from the cars than where the ties being unloaded usually fell." (Statement of facts Supreme Court of North Carolina, 229 N. C. at page 237, R. page 35.) The men throwing the crossties were in a hurry to finish and go home and were heedlessly getting the ties over the side of the gondola car as rapidly and forcefully as possible. (R. page 27.) One witness said, "I mean I was throwing them, too."

The foreman or supervisor of the work crew was standing on the end of the caboose nearest to the gondola in which the men were working, holding to the brace rod, watching the men in the car. (R. page 25.) He saw the conductor walking from engine to the caboose (R. page 26,) a car length or less ahead of petitioner. He gave the petitioner

no warning, nor did he warn the workmen in the car that the conductor and the petitioner were walking up the track. (R. page 25). The workmen in the car could see over the side, which was four feet high. (R. page 12.) The foreman testified: It was "nothing at all unusual for members of the train crew who are on the cab to go to the engine and those on the engine to go to the cab." (R. page 26.)

The workmen themselves gave petitioner no warning of their intention to throw the tie further than was customary. Petitioner was injured while obeying an order of his superior in the same way he had performed that duty "a dozen or two" times that day in safety. Petitioner contended in the trial and on the appeal in the North Carolina courts that he was seriously and permanently injured by the negligence of the respondent "in whole or in part" in that

(a) The respondent failed to keep the place furnished him to work in as safe a condition as customary, and reasonable, as judged by the standards of a reasonably prudent man, and

(b) The respondent's agents and employees had reason to anticipate the movements and position of the petitioner at the time of the injury, and failed to warn him of the unusual action about to take place.

C

Question Presented

Whether in an action under the Federal Employers' Liability Act of April 22, 1908, as amended by the Act of Aug. 11, 1939, brought by a railroad employee against the railroad for damages for personal injuries sustained by him while working on the work train there was sufficient evidence of negligence on the part of the carrier for the case to be submitted to the jury.

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Reasons Relied on for Allowance of Writ

The Supreme Court of North Carolina has decided an important question of Federal law in a way probably not in accord with applicable decisions of the Supreme Court of the United States. From the meager explanation by the Supreme Court of North Carolina of the basis of its decision to affirm a judgment dismissing the action, which explanation is contained in nine lines of print (*Hill* v. *R. R.* 229 N. C. 237, 238, R. p. 35) it appears that the basis was the principle of law which ruled such cases at common law, to wit: That the master owes no duty to his servant working in a railroad yard or other similar place of danger with respect to the safety of the place to work, or with respect to the negligent acts of his fellow-servants, for that it is the servant's duty to look out for himself in such circumstances. The decision fails to take into account the fact that that principle of law was cast into oblivion in cases arising under the Federal Employers' Liability Act, as amended in 1939, as construed in *Tiller* v. *A. C. L. R. R.* 318 U. S. 54, 87 L. Ed. 610, 63 S. Ct. 444, 143 ALR 967, and *Tiller* v. *R.R.*, 323 U. S. 574, 89 L. Ed. 465, and *Lavender* v. *Kurn*, 327 U. S. 645, 90 L. Ed. 916; and *Bailey* v. *Central Vermont R. R. Co.*, 319 U. S. 350, 87 L. Ed. 1444; and *Jacob* v. *City of N. Y.*, 315 U. S. 752, 86 L. Ed. 1166; *Ellis* v. *Union Pacific R. R.*, 329 U. S. 649, 91 L. Ed. 572; *Lillie* v. *Thompson*, — U. S. —, 92 L. Ed. Adv. Op. 115 (*per curiam*); *Johnson* v. *U. S.*, — U. S. —, 92 L. Ed. Adv. Op. 360; *Anderson* v. *Atchison, Topeka & Santa Fe R. R.*, — U. S. —, 92 L. Ed. Adv. Op. 840 (*per curiam*) and others.

A supplemental brief accompanies this petition.

Wherefore your petitioner respectfully prays that a writ of certiorari issue to review the final judgment of the

Supreme Court of North Carolina entered by that court in this case on 22nd September, 1948, and that the said final judgment may be reversed by this Honorable Court and the case remanded to the Superior Court of Nash County, North Carolina, for a new trial, and that your petitioner may have such other and further relief as this Honorable Court may deem proper.

ISAAC D. THORP,
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HUBERT E. MAY,
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FRANCIS E. WINSLOW,
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Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

E. A. HILL,

Petitioner,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY,
a Corporation,

Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinion of the Court Below

The opinion of the Supreme Court of North Carolina is reported in the advance sheets 229 N. C. 236 (R. page 34). The Superior Court of Nash County, North Carolina, did not deliver a written opinion.

II

Jurisdiction

The jurisdiction of this court is invoked under 28 U. S. Code, Sec. 1257(3). The judgment of the Supreme Court of North Carolina, sought to be reviewed, was entered on 22nd day of September, 1948 (R. page 37) and petition for Writ of Certiorari was presented within ninety days thereafter.

III

Statement of the Case

A statement of the case appears under the heading "B" of the Petition for Writ of Certiorari. In the interest of brevity that statement is not now repeated but is referred to with the request that it be considered as herein incorporated by reference.

IV

Question Presented

The question specifically brought forward by the Petition for Writ of Certiorari appears under heading "C" of the petition. Again, in the interest of brevity, it is not now repeated, but is referred to with the request that it be considered as herein incorporated by reference.

V

The Statute Involved

This suit was instituted under the provisions of the Federal Employers' Liability Act of April 22, 1908, Chap. 149, 35 Stat. 65; U. S. Code Title 45, Chap. 2, Sec. 51 et seq, as amended by the Act of Congress August 11, 1939, Chap. 685, Sec. 1; 53 Stat. 1404, hereinafter called the Act, and there is no issue as to its applicability. Sections 1, 3 and 4 of the Act, which are pertinent to the issues involved in this case, as amended read as follows:

Section 1 (45 U. S. Code 51): Liability of Common Carriers by Railroad, in Interstate or Foreign Commerce, for Injuries to Employees from Negligence: Definition of Employees:

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or

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between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, par. 1, 35 Stat. 65; Aug. 11, 1939, c. 685, par. 1, 53 Stat. 1404.

Section 3 (45 U. S. Code 53): CONTRIBUTORY NEGLIGENCE; DIMINUTION OF DAMAGES:

In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety

of employees contributed to the injury or death of such employee. Apr. 22, 1908, c. 149, par. 3; 35 Stat. 66.

Section 4 (45 U. S. Code 54): ASSUMPTION OF RISKS OF EMPLOYMENT:

That in any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. Apr. 22, 1908, c. 149, par. 4; 35 Stat. 66; Aug. 11, 1939, c. 685, par. 1; 53 Stat. 1404.

VI

ARGUMENT

Summary of Argument

1. The Federal Employers' Liability Act enlarges the common law liability of the master to his servant for personal injuries caused "in whole or in part" by the master's negligence by eliminating the fellow-servant rule, the doctrine of assumption of risk, and contributory negligence as defenses, and by setting up the rule of comparative negligence, so that even if the employee were in any way negligent himself he can still recover for injuries caused in whole or in part by the master's negligence, such amount as the jury shall determine to be fair compensation under the circumstances existing.

2. The sole question is whether the respondent was negligent in any manner which contributed to the injury. Peti-

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tioner's evidence of respondent's negligence was more than sufficient to justify submission of the question to the jury.

1

Hill did not assume the risks of negligence of respondent or its employees and is entitled to recover for such negligence, notwithstanding that he may himself have been guilty of negligence if the jury should so find.

This proposition was decided in *Tiller* vs. *A. C. L. R. R. Co.*, 318 U. S. 54, 87 L. ed. 610, 63 S. Ct. 444, 143 ALR 867, and the same case on second appeal, 323 U. S. 574, 89 L. ed. 465.

This decision has been so often followed that it is deemed unnecessary to cite additional authorities.

2

Petitioner's evidence of respondent's negligence warranted submission of the question to the jury.

The negligence alleged in the complaint (R. page 1, *et seq.*) was (1) that the respondent failed in its duty to furnish petitioner with a safe place to work, and (2) that the respondent's agents and servant, fellow-servants of the petitioner, suddenly and without warning, threw upon the petitioner a crosstie with greater force than was necessary, or customary, in that they threw the crosstie much farther away from the car than was usual, without warning the petitioner.

The respondent owed to the petitioner the duty of furnishing him with a safe place to work. That duty was a continuing one from which the respondent was not relieved by the fact that the petitioner's work at the place in question was "fleeting or infrequent"; and that duty became "more imperative as the risk increased". *Bailey* v. *Cen-*

tral-Vermont R. R., 319 U. S. 350; 87 L. Ed. 1444. This is a duty which the master could not delegate and for breach of which he would be liable, even at the common law, but under the Act here invoked the master is liable for breach of that duty even though the place is made unsafe by the act of a fellow-servant of the petitioner, without regard to the delegability of the duty.

Under the Act the master is liable to employees working in railroad yards and other similar places of danger, for the acts of any of its agents or servants, in performing their duties in an unusual and unexpected manner, without giving warning to other employees who might be endangered thereby. In *Tiller* v. *A. C. L. R. R.*, 323 U. S. 574, 89 L. Ed. 465, the court approved (323 U. S. 579, 89 L. ed. 470) the following charge to the jury: "The court charges the jury that if you believe from the evidence that Mr. Tiller was struck while the engine and cars of the defendant were making a back up movement on the night of March 20, 1940; that such movement was an unusual and unexpected one, and a departure from the general practice followed in making up train No. 209; that Mr. Tiller on the occasion in question was working on or near the slow siding without knowing or having reasonable cause to believe that such a movement would be made, then it became and was the duty of the defendant in making such movement to give adequate warning of the same, and if the jury believes from the evidence that the defendant failed to perform such duty and as a proximate result of such failure Mr. Tiller received injuries from which he died, then the jury should return a verdict for the plaintiff." As to that charge the court said through Mr. Justice Black: "The Circuit Court of Appeals held that there was substantial testimony to support a finding that the movement was an unusual one. Nevertheless, because no railroad rule or custom prohibited such an unusual movement, because some of the evidence

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showed that the same movement had been performed on other occasions, and because Tiller was familiar with the local situation, the Circuit Court of Appeals held that the railroad owed no duty to warn him of such an unusual movement. We *cannot say that a jury could not reasonably find negligence from the evidence which showed such an unprecedented departure from the usual custom and practice in backing cars without giving 'adequate warning of the movement'* ". The judgment of the Circuit Court of Appeals was reversed and the judgment of the District Court was affirmed.

Similarity between the second Tiller case (last above cited) and the case at bar is striking. In this case as in that the Appellate Court held that there was evidence that the movement was unusual. The Supreme Court of North Carolina in its statement of facts (229 N. C. 236 at 237, R. page 35) found: "The place where plaintiff was walking was farther from the cars than where the crossties being unloaded usually fell". Since the evidence in the case was sufficient to warrant this finding by the Supreme Court of North Carolina it is deemed unnecessary to further labor that point. However see R. page 19 where the petitioner Hill testified to the customary manner of throwing out the ties. He said "they don't exactly throw them over the side—lift them out enough to go over the side and let it tumble over the side".

So we have a case in which the ties were usually just "tumbled over" the side of the gondola car, but in which the petitioner was permanently injured by a tie which was, contrary to custom and practice, thrown a distance of 18 feet from the car. Before engaging in such unprecedented and dangerous practice the agents and servants of the respondent, if they had used due care, would have given warning to the petitioner to seek a place of safety, if they

as reasonably prudent men should have anticipated the presence of the petitioner in the area of danger. The Supreme Court of North Carolina held that the respondent had no duty to warn the petitioner of impending danger for the reason that its agents and servants had no reason to anticipate petitioner's presence there. The court found "there is no evidence the workmen engaged in throwing out crossties saw the plaintiff, or had reason to anticipate his walking along near the track at the time" (229 N. C. 237 R. page 35). This appears to be the crux of the decision.

Petitioner contends that the respondent's agents and servants either saw him or had reason to anticipate his presence, and that the jury could so find on the evidence in this case. Petitioner was required to act under the orders of the conductor. In the performance of his duties he had walked back and forth between the engine and cab "a dozen or two times that same day" (R. page 14), using the same procedure (R. 14). The conductor had made the same journey from cab to engine and back "several times that day" (R. page 21). The conductor testified that the other side of the track was unsafe because of the fast trains on the northbound track. The foreman or superintendent of the workmen in the gondola car who were engaged in throwing over the ties was standing on the end of the caboose, holding to the brace rod, overlooking the men in the car within a car length of the petitioner as he approached the area of danger, directly in the range of vision of the foreman, who admitted that he actually saw the conductor walking along the track at or near the same place less than a car length ahead of the petitioner, and the foreman testified that it was "not at all unusual for members of the train crew who are on the cab to go to the engine and those on the engine to go to the cab" (R. page 26). Upon this evidence the question whether the respondent's agents and servants saw the petitioner or as reasonably prudent

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men should have anticipated that he might be present, and should have looked out for him, was withdrawn from the jury and decided by the court against the petitioner, as a matter of law. This limitation on the function of the jury in this type of cases is contrary to the rule laid down by this Honorable Court. *Tiller* v. *A. C. L. R. R.* 318 U. S. 54, 87 L. ed. 610, 63 S. Ct. 444, 143 ALR 967; and *Tiller* v. *R. R.* 323 U. S. 574, 89 L. ed. 465; and *Lavender* v. *Kurn* 327 U. S. 645, 90 L. ed. 916; *Bailey* v. *Central-Vermont R. R. Co.*, 319 U. S. 350, 87 L. ed. 1444; *Jacob* v. *City of New York*, 315 U. S. 752, 86 L. ed. 1166; *Ellis* v. *Union Pacific R. R.* 329 U. S. 649, 91 L. ed. 572; *Lillie* v. *Thompson*, 332 U. S. 459, 92 L. ed. Adv. Op. 115 (*per curiam*); *Johnson* v. *U. S.* 333 U. S. 46, 92 L. ed. Adv. Op. 360; *Anderson* v. *Atchison, Topeka & Santa Fe R. R.*, 333 U. S. 821, 92 L. ed. Adv. Op. 840, (*per curiam*), and other cases.

Petitioner is in agreement with that part of the opinion of the Supreme Court of North Carolina which holds that the Act does not make the employer the insurer of the safety of the employees while they are on duty, and that the basis of his liability is his negligence, and that such negligence must be in whole or in part the cause of the injury. That the petitioner agrees is the law, and to that point the North Carolina Court devoted the greater part of its opinion, all but nine lines. The only part of that opinion which reveals the decision on the sufficiency of the evidence to put the case to the jury on the question of respondent's negligence, is contained in nine lines of print reading as follows: (229 N. C. 237-238, R. page 35).

"Upon the evidence presented as it appears of record, the judgment of nonsuit was properly entered. The evidence fails to show under the circumstances here any duty encumbent upon the workmen on the cars in unloading crossties in the usual way to anticipate the movements and position of the plaintiff at the time of injury. Equally the evi-

dence is wanting in probative value to show negligent failure on their part to perform a duty owing the petitioner which proximately caused the injury complained of. Stated briefly, the evidence fails to make out a case of actionable negligence."

The court cites no authority whatsoever to indicate the ground of its conclusions. The opinion does not explain in any way why the workmen on the gondola car and their foreman, who was standing in a high place overlooking the scene, were relieved of the duty of taking any care whatsoever of persons like the petitioner and the conductor who had been all day long walking up and down the track from the cab to the engine and back again in the performance of their duties. The Supreme Court of North Carolina, neither in its statement of the facts nor in its opinion, anywhere mentions the evidence above referred to, and relied upon as warranting a reasonable inference that the respondent's agents and servants had seen the plaintiff walking up and down the track and had reason to anticipate that his duties might require him to do so again. The inference is inescapable that the workmen had seen what was going on over the side of the car; and the evidence is direct from the foreman (R. page 26) that it was "nothing at all unusual for members of the train crew who were on the cab to go to the engine and those on the engine to go to the cab". But none of this is in any way referred to in the opinion of the court below. The court below contents itself with the statement that "there was no evidence" to support any such inference and relieves the respondent of any duty of looking out for the petitioner because, the court says, there was no such evidence. The Record shows that there was evidence and plenty of it.

The only reasonable explanation of the decision of the court below, since it failed to cite any cases arising under the Act to support its ruling, that occurs to the petitioner,

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is that the court was influenced by the common law doctrine that the master owes no duty to his servant working in a railroad yard, or other similar place of danger, with respect to the safety of a place to work, or with respect to the negligent acts of his fellow-servants, for that it is the servant's duty to look out for himself in such circumstances.

That is the doctrine of the assumption of risk which deprived servants of rights of action against their masters in circumstances in which a member of the public might have had relief. For example, in this case there was a roadway running parallel with the track, separated from the southbound track by a spur track and a ditch, upon which the public travels. If instead of propelling the crosstie three times its length from the car in their haste to get home, the respondent's workmen had propelled it four times its length into the highway, and if it had struck down a pedestrian on the highway, there would be no question about his right to recover. But the Supreme Court of North Carolina has decided that the petitioner, because he works for the respondent, is not entitled to recover where the crosstie was thrown the unusual distance of 18 feet, three times its length. There is evidence that his presence should have been anticipated at the point of danger as much as the presence of a pedestrian on the highway. Therefore the basis of the decision must be that the petitioner as an employee of the respondent had assumed the risk of the negligence of the respondent, its agents and servants. But in cases arising under the Act the defense of assumption of risk has been absolutely "obliterated" in a case in which the employer has been negligent. *Tiller* v. *A. C. L. R. R. Co.* 318 U. S. 54. And this Honorable Court has refused to permit its recrudescence under another label, to wit, a finding of "no negligence" on the part of the employer (318 U. S. 54, 66-67).

The theory that the Court below decided this case on the basis that the petitioner assumed the risks of his employment although the opinion does not mention assumption of risk, is bolstered by the fact that the Court below stressed a statement the petitioner made on his cross-examination to the effect that "on this particular occasion those men were doing what they were supposed to be doing" (R. page 19, opinion 229 N. C. at page 237, R. 34). The doctrine of assumption of risk means that the employee assumes the ordinary risks of his employment and it is evident that the Court below had this in mind, in stressing this statement. However, petitioner points out that the language is susceptible of two different interpretations by the jury. One reasonable inference from it is that the witness meant that the men were throwing out ties and that that was what they were hired to do, and that interpretation is in no way inconsistent with the petitioner's contention that the particular tie which struck him down was thrown further than was necessary or customary and was a sudden and unexpected action, which required a warning to him before it was done. The witness had previously testified that the men were "supposed" just to tumble the ties over the side of the car (R. page 19) and that and other evidence warranted the finding by the Court below (229 N. C. 237, R. page 34) that "the place where plaintiff was walking was farther from the cars than where the ties being unloaded usually fell" (R. 35).

How far the act has removed the doctrine of assumption of risk from this type of cases is illustrated by *Jacob* v. *City of New York,* 315 U. S. 752, a simple tool case, in which it is suggested that the Federal Employers' Liability Act, and the Jones Act, have probably eliminated entirely from cases arising under them, the simple tool doctrine, resting on the basis that the master is relieved of the duty of inspecting simple tools for defects because his servant's op-

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portunity for ascertaining such defects is equal to or greater than the master's. In that case, of a defective wrench, the Court held that the case should have been submitted to the jury.

In *Johnson* v. *United States*, 333 U. S. 46, 92 L. Ed., Adv. Op., page 360, decided February 9, 1948, a case arising under the Jones Act, applying the standard of liability of the Federal Employers' Liability Act, this Honorable Court applied the doctrine of res ipsa loquitur to the acts of a fellow servant in dropping a block upon the plaintiff working below him, saying through Mr. Justice Douglas that "A man who is careful does not ordinarily drop a block on a man working below him * * * and there is no reason in logic or experience why res ipsa loquitur is not applicable to acts of a fellow servant * * *. True, the doctrine finds most frequent application in cases of injuries arising from instruments or properties under the employer's exclusive control. * * * While the acts of negligence underlying such accidents may reach higher into the management hierarchy than the one involved here, the Federal Employers' Liability Act compels us to go no higher than a fellow servant * * * human experience tells us that careful men do not customarily do such an act."

If this case were submitted to a jury, the jury might speculate that the tie bounced eighteen feet after hitting the ground, or that it may have struck another slippery tie and ricocheted eighteen feet. This is pure guess or speculation and highly improbable. But there is direct evidence, not speculation, that the men were "winding up in a hurry to go home" and "I sure was throwing out crossties at the time he got hit. I mean I was throwing them, too" (R., page 27). From this evidence, without the application of the doctrine of res ipsa loquitur, the case is for the jury on the question whether the workmen carelessly or heedlessly threw the tie further than was necessary or customary,

striking down the petitioner, a fellow workman, who was where he was under orders from the conductor and whose presence under the evidence in this case should have been anticipated by the workmen. Petitioner respectfully suggests that under the Johnson case, even without this direct evidence of negligence, the doctrine of res ipsa loquitur would have required the submission of the case to the jury, as to the negligence of the workmen in the car.

But that isn't all. There is still the question of the negligence of the foreman, a fellow servant of the petitioner, who was standing on a ladder at the end of the caboose overlooking the gondola car, when the petitioner was less than a car length away and in his range of vision. The foreman actually saw the conductor who was walking a short distance ahead of the petitioner, and from his position the jury could reasonably infer that he actually saw the petitioner or that he should have seen him, and that if, as the respondent contended below, the crossties frequently bounced so far and that the petitioner "just walked under the ties," the foreman, seeing the petitioner walking into a death trap, should have given some warning either to the petitioner or to the men on the car. The petitioner testified that he was walking on rough ground, crossing a spur track and a ditch filled with cold water and was intent on picking his way across rough ground when he was struck. He said "anybody walking on rough ground will notice where they are walking and that was the moment I got struck" (R., page 14, near the top). He was in a difficult position and the foreman, looking right at him, was in position to help him.

Under the act here involved, it is no longer necessary to attempt metaphysical distinction between contributory negligence and assumption of risk. If the petitioner might reasonably have himself foreseen the danger of a tie being

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thrown eighteen feet, his negligence in not looking out for himself is not a bar to this action. Only a jury under our system of jurisprudence is authorized to make the adjustment and comparison between the negligence of the petitioner and the respondent.

VII

Conclusion

In conclusion counsel for petitioner respectfully submits:

1. That petitioner's evidence of negligence on the part of respondent was more than sufficient to justify reference of the case to the jury.

2. That the Judge of the Superior Court erred in refusing to submit the case to the jury on the issues of fact and in entering a judgment of nonsuit dismissing the case, and that the Supreme Court of North Carolina erred in affirming that action and refusing to remand the case for a new trial.

3. That a writ of certiorari, therefore, should be granted, and that this Court should review and reverse the decision of the Supreme Court of North Carolina and remand the case for a new trial.

Respectfully submitted,

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HUBERT E. MAY,
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FRANCIS E. WINSLOW,
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Counsel for Petitioner.

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[fol. 1] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1948

No. 472

E. A. HILL, Petitioner,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY, a Corporation, Respondent

ADDENDUM TO BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

Isaac D. Thorp, Harold D. Cooley, Hubert E. May (Cooley & May), Francis E. Winslow (Battle, Winslow & Merrell), Counsel for Petitioner.

Copy was served on counsel for respondent December 28, 1948.

[fol. 2] In Norfolk and Portsmouth Belt Line Railroad Co. vs. Jones, 183 Va. 536, 32 S. E. 2nd 720 (Jan. 15, 1945), where one not an employee of the railroad, but whose presence in the danger area should have been anticipated by Wilkins, the foreman of the railroad's work crew, was killed by a steel rail thrown over the side of a gondola car by the work crew, the court held the railroad liable for the negligence of Wilkins. The evidence fixing upon Wilkins the duty to keep a lookout for plaintiff's intestate was similar to the evidence in this case. The court said at 32 S. E. 2nd, p. 724:

"It is said that it is not necessary to take precautionary measures where the injury could not have been anticipated. A witness was asked:

"Q. This path that you say Mr. Reynard was on, had you seen other people use that path? A. Sure, we all walked up and down that way. There was no other way."

And at page 725:

". . . Those coming from the east would have passed no one but would have been in plain sight of Wilkins for an indefinite distance. Wilkins knew or should have known

that this paymaster on Saturdays came to and settled with men on the job. He was, as we have seen, a part of the Shaner men assigned to this work. They had to go there and lay rails, and he had to go there and pay them off. • • •

"(10) If Wilkins had looked down this walkway to the east he could not have failed to see Reynard. The plain fact is that he did not look. • • • And in this connection we might say once and for all that the failure to note Raynard's approach was actionable negligence whether Reynard was an invitee or a licensee . . ."

The Court is respectfully requested to consider this additional authority on behalf of petitioner.

Copy of this addendum was served on counsel for respondent on December 28, 1948.

Isaac D. Thorp, Harold D. Cooley, Hubert E. May (Cooley & May), Francis E. Winslow (Battle, Winslow & Merrell), Counsel for Petitioner.

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